No. 745

Supreme Court of the United States

CENTRAL GREYHOUND LINES, INC., OF NEW YORK,

Petitioner-Appellant,

—against—

CARROLL E. MEALEY, JOHN F. HENNESSEY and JOSEPH M. MESNIG, constituting the State Tax Commission of the State of New York,

Respondents-Appellees.

BRIEF BY PETITIONER-APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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Statement.

On November 9, 1946, the petitioner-appellant was served with the Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, dated November 8, 1946. Such Statement and Motion was made in opposition to the appeal taken by the petitioner-appellant as allowed by the Chief Judge of the Court of Appeals for the State of New York on October 21, 1946.

The petitioner-appellant has duly complied with all of the Rules of this Court and the record of this cause is now in the process of being transmitted to this Court by the Clerk of the Court below.

It is submitted that the Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, dated November 8, 1946, does not disclose any matter or ground making against the jurisdiction of this Court which has been previously asserted by the appellant. The said Statement, etc., does not set forth any grounds, as required by the rules of this Court, particularly Rule 7, Sub-paragraph 4, for the affirmance or dismissal of the appeal. It is manifest, as is demonstrated in the Jurisdictional Statement, Petition, and Assignment of Errors previously filed, that the appeal was and is taken on questions which are, indeed, substantial and require further argument, and a reversal.

The Proceedings in the Courts Below.

The appeal is taken from an order and judgment of the Court of Appeals of the State of New York embodied in its remittitur dated July 23, 1946, as amended October 15, 1946. The Court of Appeals affirmed an order of the Appellate Division of the Supreme Court, Third Judicial Department, which confirmed a final termination of the appellees. The cause arose as a proceeding under Article 78 of the New York Civil Practice Act brought to review the decision of the State Tax Commission.

The decision of the State Tax Commission involved the tax, as such, and as laid and assessed, under Section 186-a of the Tax Law of the State of New York which imposes a tax of 2% upon the "gross income" of corporations subject to the supervision of the Department of Public Service.

The appellant, Central Greyhound Lines, Inc., of New York, is an omnibus corporation subject to the supervision of the Department of Public Service. It carries passengers within and without the State of New York. The Company has paid the tax under 186-a upon revenue received from intrastate passengers. The State Tax Commission by the decision under review, as now appealed, has levied an additional tax against the Company based upon the revenue from passengers who travel through Pennsylvania and New Jersey on a journey which originates and terminates in New York State. This type of business is illustrated by passenger service from New York City to Syracuse, New York, where the busses travel via New Jersey and Pennsylvania.

The decision under review, and as now appealed, covers the tax for the month of July, 1937. For that month the revenue attributable to the mileage traversed within this State was 57.47% of the total revenue from the type of business under consideration. The period of July, 1937, was selected as a test period by agreement of the parties but the judicial result is to be applied to all the assessments "to date, for which application for revisions have been filed." (Folio 86 of the printed record on appeal in the Court of Appeals.)

The appellees decided that Section 186-a of the Tax Law applied to such bus transportation originating and terminating in this State and refused to pro-rate the revenue to the mileage traversed in this State.

The Appellate Division of the Supreme Court, Third Judicial Department, handed down a decision on November 10, 1943 (266 A. D. 848), and after discussing the question of the constitutionality of the statute, stated:

"In the light of the Federal decisions, we see no merit to the contention of petitioner that section 186-a of the Tax Law as above construed is a violation of the interstate commerce clause of the Federal Constitution. As stated above, this kind of transportation is not interstate commerce. * * *

"Finally, this is a tax against a certain corporation for the privilege of doing business in New York State. It is measured by its gross income. Consequently it is not a burden upon the particular business here sought to be exempted." (266 A. D. at 650.)

The Appellate Division thereafter refused leave to appeal to the Court of Appeals but the last mentioned Court upon a direct application for leave to appeal, granted leave to appeal.

After the submission of briefs and oral argument, the Court of Appeals rendered a decision on July 23, 1946 (296 N. Y. 18), in which it stated:

"There is no constitutional objection to taxation of the total receipts here. This is not interstate commerce (Cited Cases) * * *." (296 N. Y. at 25.)

On October 15, 1946, on motion of the petitioner, the Court of Appeals amended its remittitur by stating as follows:

"Remittitur amended by adding thereto the following: 'A question under the Federal Constitution was presented and passed upon by this Court, viz., whether Section 186-a of the Tax Law of the State of New York, as construed by the Tax Commission, is repugnant to the interstate commerce

provision of the Federal Constitution, Article I, Section 8. This court held that the aforesaid statute as so construed is not repugnant to that provision of the Federal Constitution.'"

Argument.

As appears above, there was drawn in question the validity of the statute, 186-a of the Tax Law, on the ground that it was repugnant to the Constitution of the United States and the decision of the Court of Appeals was in favor of its validity. It is submitted that the constitutionality of the statute was passed upon, and necessarily so, as is plain from the bare reading of the Court of Appeals opinion, together with the amended remittitur.

There was no waiver at any time on the record. In the brief filed by the petitioner-appellant in the Court of Appeals, reference was made to the constitutional question. In fact, the petitioner-appellant cited cases referred to in the opinion of the Court of Appeals, namely, *Lehigh Valley Railroad vs. Pennsylvania* (145 U. S. 192) and *United States Express Co. vs. Minnesota* (223 U. S. 335) and *Hanley v. Kansas City Southern Railway Co.* (187 U. S. 617) and quoted therefrom and stated that the commerce, concerned in such cases, was in fact interstate commerce and that the States had only limited powers in respect to it. The brief of the petitioner-appellant went on to say:

> "Regardless of any constitutional question that may be involved in the construction of the statute, we make the point that the legislature has used language in Section 186-a which limits the tax to the revenue from that portion of the utility service which is consumed here." (Pages 4 and 5 of appellant's Brief to the Court of Appeals.)

This Statement in Opposition to Jurisdiction and the Motion to Dismiss or Affirm press the argument, on page 4 thereof, that appellant's objection addressed to the unconstitutionality of the statute, as such, and as construed, and to the tax as laid and assessed, was waived. The said Statement cites *Galloway vs. Erie Railroad Co.*, 116 App. Div. 777, 780; Aff. on opinion below, 192 N. Y. 545). It is submitted that such case is not applicable on the facts here involved. That case concerned an intermediate appeal and does not stand for the broad proposition for which it was cited. (See *People vs. Journal Co.*, 213 N. Y. 1, 6) and (*Babba vs. Yonkers National Bank and Trust Co.* (265 A. D. 828, 830).

All questions were presented and preserved in the Courts below which are now the subject of Assignment of Errors in this Court.

As set forth in the papers on appeal herein, the issues raised in this case involve questions which are substantial. The Court of Appeals in the opinion below sought to distinguish the cases on which the appellant relied of *Lehigh Valley Ry. vs. Pennsylvania*, 145 U. S. 192; *United States Express Co. vs. Minnesota*, 223 U. S. 335; *State of Minnesota vs. United States Express Co.*, 114 Minn. 346; *Hanley vs. Kansas City So. Ry. Co.*, 187 U. S. 617. The net effect of the Court of Appeals opinion is that the Supreme Court cases, just cited, are not authorities for the appellant's position. It was, and is, the view of the appellant that in the Supreme Court cases just cited, the Supreme Court of the United States has clearly expressed at least a substantial doubt as to the power of a State to tax gross receipts from the transportation business of the character involved in the case at bar, so far as the tax

might have been applied to receipts from mileage without the State. Such was the interpretation the Supreme Court of the State of Minnesota placed upon the United States Supreme Court decision in the cases of *Lehigh Valley Ry. vs. Pennsylvania*, 145 U. S. 192, and *Hanley vs. Kansas City So. Ry. Co.*, 186 U. S. 617, for in the case of *State of Minnesota vs. United States Express Co.* (114 Minn. 346), the Court stated with respect to this identical problem:

> "We interpret the decision (The Lehigh Valley decision) as allowing a recovery of taxes upon that proportion of the earnings derived from the carriage wholly within the state. This seems to us the safer rule and avoids any question of taxing interstate commerce, and we adopt and apply it to this case."

The United States Supreme Court agreed with this decision of the Supreme Court of Minnesota and stated:

> "As to such shipments, the Supreme Court held that 9 per cent of the taxes claimed on this class of earnings should be deducted from the amount of the recovery allowed in the court of original jurisdiction, since it was disclosed that only 91 per cent of the mileage was within the state. For this part of the decision the Minnesota court relied upon Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 Led. 672. * * * An examination of that case shows that it is decisive of the present one on that point, and we need not further discuss this feature of the case." (223 U. S. 335.)

The case of *People ex rel. Cornell Steamboat Co. vs. Sohmer*, 235 U. S. 549, which involved a different taxing statute and upon which the Court of Appeals below relied is readily distinguishable, because in that case the taxpayer failed to

show, though the opportunity was afforded to it before the State Tax Commission, the portion of the revenue attributable to its towings outside of the State of New York. On the basis of the Lehigh Valley case (145 U. S. 192) such a showing was a prerequisite to the taxpayer's obtaining relief. In the case at bar, there is a specific finding by the New York State Tax Commission that the petitioner received from bus transportation originating and terminating in the State of New York but traversing without the State of New York for some portion of the journey, the sum of $84,412.31 (for the month of July, 1937, a month chosen as a basis for the decision—Folio 130 of the printed record on appeal in the Court of Appeals), and that 57.47 per cent of the total mileage of such journeys was traversed within the State of New York and 42.53 per cent of such total mileage was traversed without the State of New York (Folio 163, record on appeal in the Court of Appeals).

It is submitted, for the reasons previously stated, that there are no matters or grounds making against jurisdiction of this Court asserted by the appellant and that the questions on which the decision of the cause depends are substantial and that this cause should be heard on the merits, and the judgment below be reversed.

All of which is respectfully submitted,

Dated: Syracuse, New York, November 25, 1946.

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